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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 492

J. MINOR SULLIVAN, III,

Petitioner,

vs.

STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

HARRY A. WALSH,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 492

J. MINOR SULLIVAN, III,

Petitioner,

vs.

STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of New Jersey refusing to grant certification to the Superior Court of New Jersey, Appellate Division, in which it upheld the judgment of the Superior Court, Mercer County, sustaining the indictment of the petitioner for perjury.

The Opinion Below

The opinion of the Superior Court of New Jersey, Appellate Division, is reported at 25 N. J. Super. 484, and is

also printed in the record at page 37a. Neither the trial Court nor the Supreme Court of New Jersey filed an opinion. The order of the Superior Court, Mercer County is printed in the record at page 29a. The order of the Supreme Court of New Jersey is printed at page 47a of the record, and the memorandum decision of the Supreme Court of New Jersey is reported at 13 N. J. 289.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on September 14, 1953 (R. 47a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), 2101 (d) and Rule 38½ of the Supreme Court Rules.

The Question Presented

The indictment against the petitioner fails to state an offense against the State of New Jersey as required by paragraphs 8 and 10 of Article I of the Constitution of the State of New Jersey (1947) and the attempted prosecution of the petitioner thereunder constitutes a denial of due process of law guaranteed to him under the Fourteenth Amendment of the Constitution of the United States.

Statement of Matters Involved

The Grand Jury of Mercer County handed up an indictment of the defendant, J. Minor Sullivan, III, a physician licensed by the State of New Jersey and engaged in the practice of medicine in the City of Trenton, in which it was alleged that the defendant had committed perjury in testifying to certain medical evidence as a witness for the State of New Jersey in the second trial of a murder indictment in *State* v. *Cooper, and others,* in the Superior Court, Mercer County, 10 N. J. 532 (1952).

The indictment charges in eight counts that the defendant did (a) falsely swear and testify to certain medical

opinions and observations (to the effect of the testimony quoted in the indictment) made as a result of physical examinations of the defendants in *State* v. *Cooper and others;* (b) and (without being put at issue with the opinions to which the defendant testified as having appeared to exist) that the defendant knew such conditions did not exist as a matter of fact, at the time of the examination of the defendant (R. 1 a).

For example, in count 1, it is alleged that at the trial of *State* v. *Cooper* on the question of whether or not Cooper had understandingly and voluntarily admitted participation in the crime of murder, the petitioner testified falsely as a witness for the State as follows (R. 3 a):

> "Q. And I ask you specifically was his condition such that you, a trained medical observer, you felt from your experience that he was under the influence of drugs at that time.
>
> A. Yes, he appeared to be so."
>
> "* * * Whereas in truth and in fact, as he the said J. Minor Sullivan III, then and there well knew the said Ralph Cooper was not under the influence of drugs * * *."

A study of the indictment will show that all of the questions directed to Doctor Sullivan during his examination as a witness called for his opinions or beliefs with respect to the state of mind of each of the several defendants in a murder case at the time he is alleged to have admitted that he participated in the murder. The indictment shows (1) that although Dr. Sullivan testified that an "examination and observation of drowsiness and laxiness", together with other stated symptoms "indicated" and "suggested" him to ask one Ralph Cooper, "if he had been smoking marijuana," he "well knew that the said Ralph Cooper was not under influence of drugs and that he had not been smoking marijuana"; (2) that although Doctor Sullivan

testified that one Collis English "appeared just a little mumbly or a little confused or highly nervous," he "well knew, the said Collis English was not mumbly and confused and was not highly nervous"; (3) that although Doctor Sullivan testified that with respect to one McKinley Forrest when asked "whether a severe shock to the mind could produce a state of excitement" that he observed in McKinley Forrest, or whether there were "drugs which could have produced this condition of excitement," he answered in the affirmative, nevertheless, he "well knew, the said McKinley Forrest was not suffering from severe shock and was not in an amnesic state" etc., and was not under the influence of any drugs; (4) that although Doctor Sullivan testified that one John MacKenzie was "nervous" and "moderately excited," and that "from the symptoms manifested, being relatively nervous, a drug could have been used," making him appear "to be in a controlled state, as if having had a drug" according "to my best recollection", nevertheless, "the said J. Minor Sullivan then and there well knew, the said John MacKenzie was not nervous and moderately excited and was not drugged and was not in a controlled state"; (5) that although Doctor Sullivan testified that one James H. Thorpe was "kind of depressed" and "appeared in a suggestible state" and that Thorpe, who stated that he was not guilty, explained he was signing a confession because "I am just going to get a few days or a month, and I am going to sign it", nevertheless, "the said J. Minor Sullivan, III, then and there well knew, the said James H. Thorpe was not in a depressed and susceptible and suggestive state and had not been promised anything"; (6) that although Doctor Sullivan, again with respect to Collis English, testified that as he found him "acting with mental pressure," and that "he was confused, and with his cardiac condition, his mumbling, I

would say it was the result of pressure'' so that ''he would not be acting of his own free will'', nevertheless, ''the said J. Minor Sullivan, III, then and there well knew, the said Collis English was not acting under mental pressure and was not easily suggestive to pressure and was not confused and mumbly,'' etc. The last two counts of the indictment deal again with testimony relating to the examination and observation of McKinley Forrest and, to a large extent, cover testimony similar to that referred to in the previous counts, namely, the mental condition of McKinley Forrest and the several possible things that could have produced that condition.

The Superior Court, Mercer County, denied the motion of the defendant to dismiss on the ground that the indictment fails to state facts sufficient to constitute a crime against the State (R. 29a).

On petition under Rule 2:5-3 (b) (6) (a) of the Rules of Criminal Practice, the Superior Court, Appellate Division, granted leave to the defendant to appeal, and, in an opinion filed May 11, 1953, affirmed the order of the trial court (R. 37a).

The Supreme Court of New Jersey denied certification to the Appellate Division on September 14, 1953 (R. 47a).

Reasons Relied On for Allowance of Writ

A defendant charged with crime in a State Court is entitled to the same protection under the Fourteenth Amendment of the Constitution of the United States as a defendant charged with crime in a federal court under the Sixth Amendment. *Cole* v. *Arkansas,* 333 U. S. 196, 688 Ct. 514, 92 L. Ed. 644; *Betts* v. *Brady,* 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595; *Grossjean* v. *American Press Co.,* 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660; *Palko* v. *Connecticut,* 302

U. S. 319, 588, Ct. 149, 82 L. Ed. 288; *Re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682.

Article I, Paragraph 8, of the Constitution of New Jersey, 1947, provides that "No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, . . . ".

Paragraph 10 of Article I provides that "In all criminal prosecutions the accused shall have the right . . . to be informed of the nature and cause of the accusation, . . . ".

If the indictment is not a sufficient statement of the essential facts to charge the defendant with willful perjury in violation of N. J. S. A. Section 2:157-1, the defendant has been deprived of the "Rights and Privileges" guaranteed in paragraphs 8 and 10 of Article I of the Constitution of New Jersey, 1947.

These "Rights and Privileges" have long been embodied in the law of New Jersey and were carried directly from Article I, paragraphs 8 and 9, of the Constitution of 1844.

The Rules of Criminal Procedure of the Superior Court of New Jersey provide (Rule 2:4-11 (now Rule 3:4-3 (a))) that "The indictment or accusation shall be a written statement of the essential facts constituting the offense charged."

1. The defendant is unable to defend the indictment. He cannot ascertain the manner in which he must meet the charges of falsity in the testimony set out in the indictment.

The indictment does not allege that the testimony of the defendant contradicted the evidence given by him at the first trial of *State* v. *Cooper*. It does not charge that he gave contradictory testimony or statements at any other time.

On the other hand, the indictment charges that the defendant falsely testified to medical opinions and observations. But the indictment does not put the alleged false opinions at issue. The variance lies in the indictment alleging that the underlying facts, about which he gave his

opinions, were known to be false. To put the issue, the fact of the non-existence of such opinions must have been alleged.

Reading each count of the indictment against the defendant, it will be noted that up to and including the specification of the alleged false testimony the State has commenced a charge of perjury based upon an alleged false opinion or belief given by the defendant who was called as an expert witness to testify whether a certain named defendant in a murder case "had understandingly and voluntarily admitted his participation in the said crime of murder." From that point on, however, there is a variance from the initial allegations relative to a false opinion or belief, and, instead of charging that the defendant did not believe what he testified to, the State went off on a tangent and proceeded to deal with a different issue relating to the facts concerning which the defendant could only express an opinion or belief.

A close study of the indictment will reveal that the State, failing to find any local precedent, erroneously attempted to fit its case against the defendant into the form of indictment sustained by the former Supreme Court in the case of *State* v. *Voorhis*, 52 N. J. L. 351, 20 A. 26 (Sup. Ct. 1890). That was like trying to fit the pieces of one jig saw puzzle into another one of an entirely different design. In the *Voorhis* case the defendant testified to a fact, namely, whether or not a certain bank ever charged a greater rate of interest than the rate testified to by the defendant. The situation in that case was a far cry from the *Sullivan* case where the State takes issue with the opinions and beliefs of a witness and assumes the almost impossible task of probing into the mental processes of that witness. The very nature of the case requires that it be properly pleaded.

2. The indictment further fails to negative the truth of the alleged false testimony by specific and direct allegations.

While it is not always necessary in an indictment for perjury to negative the truth of the alleged false testimony by setting out the true facts by way of antithesis, in certain cases the circumstances may be such as to require specific allegations which are contradictory of the testimony alleged to be perjurious. *Gibson* v. *State*, 44 Ala. 17; *State* v. *Gallaher*, 123 Iowa 378, 98 N. W. 906 (Sup. Ct. 1904); *State* v. *Ela*, 91 Me. 309, 39A. 1001 (Sup. Jud. Ct. 1898); *State* v. *Nelson*, 74 Minn. 409, 77 N. W. 223 (Sup. Ct. 1898); *State* v. *Brown*, 128 Iowa 24, 102 N. W. 799 (Sup. Ct. 1905). The foregoing citations are from jurisdictions which adhere to the common law rule followed in New Jersey requiring that an indictment shall contain a description of the crime of which a defendant is accused and a statement of the facts by which it is constituted. It is the petitioner's contention in the present application to this Court for certiorari that the deviation by the New Jersey courts from the established common law rule, which is embodied in the New Jersey Constitution, in the case of the indictment against the Petitioner, constituted a denial of the due process of law guaranteed to him by the Fourteenth Amendment of the Constitution of the United States.

This does not mean that the State in a proper case is required to set forth all of the evidence, it only means that a statement of the contradictory matter should be set forth in indictment. An example of the pleading of facts negativing alleged false testimony in a perjury indictment is found in *United States* v. *Harris*, 311 U. S. 292, 61 Sup. Ct. 217, 85 L. Ed. 196; *United States* v. *Creech*, 21 F. Supp. 439 (D. C. D. C. 1937).

General allegations, such as those which are used in the

present indictment are not sufficient because they constitute mere conclusions of the pleader. *State* v. *Riggs,* 91 N. J. L. 456, 106A, 216 (Sup. Ct. 1918); *Linden Park Horse Assn.* v. *State,* 55 N. J. L. 557, 27A. 1091 (E. & A. 1893); *Titus* v. *State,* 49 N. J. L. 36 (Sup. Ct. 1868); *State* v. *Dudley,* 89 N. J. L. 42 (Sup. Ct. 1916). Thus expressions such as "whereas in truth and in fact, as he, the said J. Minor Sullivan, III, then and there well knew, the said Ralph Cooper was not under the influence of drugs," do not correct the deficiencies of the indictment.

3. The allegations of the indictment are not sufficient to support a conviction. In *State* v. *Winne,* 12 N. J. 152, 96 A. 2d 63 (1953) it was pointed out that an indictment serves to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction if one should be obtained, citing *United States* v. *Hess,* 124 U. S. 483, 8 S. Ct. 571, 31 L. Ed. 516.

In this case proof of the falsity of the opinions and beliefs of the defendant will not support a conviction. Neither would a showing of statements of such a contradictory nature as to indicate that the witness did not believe in his opinions be sufficient, because the State has failed to plead the lack of belief by the defendant.

The defendant should not be required to undergo the vexation of trial under the present indictment, for it is apparent that the indictment is palpably deficient and the defendant will be deprived of substantial rights. The indictment does not comply with the requirements of Article I, paragraph 8, of the New Jersey Constitution, or Rule 2:4-11. It does not set forth the constituent elements of a criminal offense. *State* v. *Solomon,* 97 N. J. L. 252 (E. & A. 1922), *State* v. *Bleichner,* 11 N. J. Super, 542, 78 A 2d 577 (App. Div. 1951). It does not show the nature of the crime nor the particular crime intended to be charged.

State v. *Allgor,* 78 N. J. L. 313 73A 76 (Sup. Ct. 1909). There is no sufficient statement of facts contained in the indictment showing how the alleged crime was constituted. *Linden Park Horse Assn.* v. *State,* 55 N. J. L. 557, 27A. 1091 (E. & A. 1893); *State* v. *Spear,* 63 N. J. L. 179, 42A. 840 (Sup. Ct. 1899).

The Appellate Division in its opinion referred to the recent decision of *State* v. *Winne, supra,* in support of the proposition that the discretion of the lower court should not be exercised to the end that an indictment should not be dismissed "except on the plainest grounds". Under the reasoning of the Appellate Division it is difficult to conceive any standards by which the sufficiency of an indictment may be determined. We agree that judicial discretion should not be so exercised as to work an injustice upon the State, but there are more compelling reasons why the same or more protection should be accorded to a defendant, especially in a case of the kind.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be granted to review the judgment of the Supreme Court of New Jersey.

HARRY A. WALSH,
Counsel for Petitioner.

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Supreme Court of the United States

October Term, 1953

No. 492

J. MINOR SULLIVAN, III,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Statutes and Rules of Court Involved

The Statutes of New Jersey and Rules of the State Courts involved are as follows:

Revised Statutes of New Jersey (1937) R. S. 2:157-1 (now New Jersey Statutes 2A:131-1) providing:

> "Any person who shall willfully and corruptly commit perjury or shall by any means procure or suborn any person to commit corrupt and willful perjury, on his oath or affirmation, in any action, plea, suit, bill, answer, complaint, indictment, controversy, matter or cause depending or which may depend in any of the courts of this state, or before any referee or arbitrator, or in any deposition or examination taken or to be taken pursuant to the laws of this state before any public officer legally authorized to take the same, shall be guilty of a high misdemeanor."

Rule 4:2-1 (now Revised Rule 2:2-1 Appellate Division Rules)

> "Appeals in all causes may be taken to this court from *final* judgments:
>
> (a) In causes determined by the trial division of this court;
>
> (b) In causes determined by the county courts; * * *."

Rule 2:5-3 (b) (now Revised Rule 3:5-5 (6a) (Criminal Practice Rules)

> "(a) Before trial the defendant, in the discretion of the Appellate Division, may appeal from an order of the trial court refusing to dismiss the indictment or accusation."

Rule 1:5-2 (now Revised Rule 1:10-2 Supreme Court Rules)

> "Certification to the Appellate Division is not a matter of right, but of sound judicial discretion, and will be allowed on final judgments only where there are special and important reasons therefor * * *."

Counter-Statement of Question Involved

Whether the refusal of the highest court of the State of New Jersey (Supreme Court) to exercise its discretion and grant certification to review a decision of the Superior Court of New Jersey, Appellate Division, which unanimously affirmed the trial court's denial of a motion to dismiss the indictment of the petitioner for perjury, in advance of trial, constitutes a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States.

Counter-Statement of Facts

Six negroes had been arrested by the police of the City of Trenton in connection with the murder of one William Horner. The police authorities had requested the defendant, J. Minor Sullivan, a negro physician, to come to headquarters, assuming that he was an honest, truthful and disinterested person, to witness the signing of the confessions of guilt of five of the murder defendants and with Dr. George Corio to physically examine all of them. At the first murder trial (commonly known as TRENTON SIX case) Sullivan gave plain and direct testimony that the defendants were in good physical and mental condition, or as he expressed it, his findings were "essentially negative". He also gave a similar sworn written statement to the Prosecutor's Office.

At the first trial the six negroes were convicted of first degree murder and sentenced to death. This judgment was reversed by the Supreme Court of New Jersey and at the second trial Sullivan gave contradictory testimony concerning the murder defendants as set forth in the indictment charging him with perjury (R. 1 *et seq.*).

The validity of the indictment has been sustained but the trial of the petitioner under the perjury indictment has been deferred pending this application.

Neither the arguments on the motion to dismiss the perjury indictment, nor the trial judge's statement to defense counsel that they might apply for particulars, if they felt it was necessary, are included in the petitioner's printed record. Defense counsel, by letter, informed the Court that appeal would be sought in lieu of particulars.

The State contends that the record of Sullivan's testimony in the second murder trial conclusively discloses Sullivan's willful perjury and much of this testimony is specifically set forth in the indictment. On the trial for perjury it is the intention of the State, with other evidence, to use the entire record of Sullivan's testimony in both trials to substantiate the charge of willful and corrupt perjury committed by Sullivan.

The motion of the petitioner to dismiss the perjury indictment was denied in the lower court (R. 29). The Superior Court of New Jersey, Appellate Division, granted leave to the petitioner to appeal, the State indicating that it had no objection thereto (R. 36). After the submitting of briefs and oral argument, the Appellate Division, unanimously, affirmed the order denying the motion for dismissal of the indictment. The opinion of that court is in the record (R. 37). The Supreme Court of New Jersey exercised its discretion and denied a petition for certification (R. 47).

ARGUMENT

POINT I

The petitioner had no appeal as a matter of right from the order denying the motion to dismiss the indictment.

An order adverse to an accused who attacks an indictment as invalid is not a final order or judgment. Consequently no appeal is permitted as a matter of right. *In re Robilotto,* 24 N. J. Super. 209 (App. Div. 1953), 94 Atl. Rep. 2d 207.

An indictment will not be dismissed unless it clearly appears on the face of the indictment that no valid conviction can be rendered thereon. *State* v. *Norushef,* 15 N. J. Super. 483 (App. Div. 1951), 83 Atl. Rep. 2d 622; *State* v. *Winne,* 12 N. J. 152 (1953), 96 Atl. Rep. 2d 63.

The indictment is sufficient if it affords the accused the means of preparing his defense and provides the basis for the plea of autrefois convict or autrefois acquit, in the event of a further prosecution for the same offense. *State* v. *Witte,* 13 N. J. 598 (1953) at page 608.

The Appellate Division of the Superior Court need not have granted an appeal to the petitioner, but nevertheless did so and reviewed the indictment and unanimously affirmed the order of the trial court.

POINT II

The Fourteenth Amendment does not insure a review by the highest court of a state of every ruling made by a lower court in the course of or preceding a trial.

As previously stated, there has been no trial under the perjury indictment, and hence there is no final judgment to be considered. The due process clause does not require that a defendant be entitled as of right to an appeal. The New Jersey courts acted in consonance with its own constitution, laws and procedure and the Supreme Court should not intervene. *Allen* v. *Georgia,* 166 U. S. 138 (1897), 17 S. Ct. 525.

The form of the indictment does not violate any fundamental constitutional principle, and therefore any question as to its sufficiency is for the State court to determine. *Caldwell* v. *Texas,* 137 U. S. 692 (1891), 11 S. Ct. 224, 34 L. Ed. 816; *Bergemann* v. *Backer,* 157 U. S. 655 (1895), 15 S. Ct. 727, 39 L. Ed. 845; *Barrington* v. *Missouri,* 205 U. S. 483 (1907), 27 S. Ct. 582, 51 L. Ed. 890.

The Fourteenth Amendment does not limit the power of the States to try and deal with crimes committed within their borders, and was not intended to bring to the test of of a decision of the United State Supreme Court every ruling made in the course of a State prosecution for crime. *Avery* v. *Alabama,* 308 U. S. 444 (1940), 60 S. Ct. 321, 84 L. Ed. 377.

The Federal courts will not intervene piecemeal to try collateral or incidental issues. This would expose every State criminal prosecution to insupportable disruption. It would provide opportunities to defendants to subvert the orderly effective prosecution of local crime in local courts. *Stefanelli* v. *Minard,* 342 U. S. 117 (1951), 96 L. Ed. 138, 72 S. Ct. 118.

The trial of criminal cases arising under state laws are left generally to the State courts, subject to review by the United States Supreme Court after final judgment of any federal questions involved. *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943), 63 S. Ct. 877, 87 L. Ed. 1324.

It is manifest that petitioner has not been denied due process in the refusal of the New Jersey Supreme Court to grant certification to review the judgment of the New Jersey Superior Court, Appellate Division, affirming the trial court's denial of the motion to dismiss the indictment.

No question arising under the Federal Constitution is involved in the disposition of this preliminary question in the State courts.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be denied.

MARIO H. VOLPE,
Attorney for Respondent.

FRANK H. LAWTON,
of Counsel.